United States Court of Appeals

for the Second Circuit

AMICUS BRIEF

74-1702

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

No. 74-1702

ELENA CLASS, et al.,

Plaintiffs-Appellees

v.

NICHOLAS NORTON, et al.,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR AMICUS CURIAE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

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(4)

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1702

ELENA CLASS, et al.,

Plaintiffs-Appellees,

-vs-

NICHOLAS NORTON, et al.,

Defendants-Appellants

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Amicus curiae Lawyers' Committee for Civil Rights Under Law seeks leave to file the attached Brief in order to assist the Court in resolving an issue of critical importance -- the jurisdiction of a federal court to award attorneys' fees against state officials. The Lawyers' Committee's interest in this case stems from its interest in both the substantive issue involved here -- administration of welfare systems -- and the procedural issue of attorneys' fees. The amicus has previously been allowed to file amicus briefs in the Supreme Court and a number of circuit courts on various issues involving enforcement of constitutional rights. On the issue of attorneys' fees, in particular, the amicus has filed briefs in the Supreme Court (*Bradley* v. *School Board of the City of Richmond*, ___ U.S. ____ (May 15, 1974)), the Sixth Circuit (*Taylor* v. *Perini*, No. 73-2071), the Eighth Circuit (*Fowler* v. *Schwarzwalder*, ____ F.2d

____ (June 7, 1974)), and the Ninth Circuit (*La Raza Unida* v. *Volpe*, No. 73-1145).

The amicus curiae has sought leave to file from the parties in this case. Leave has been granted by the appellee, but denied by the appellants. Copies of both letters are attached.

Wherefore amicus curiae Lawyers' Committee for Civil Rights Under Law moves that its amicus brief be filed in this case.

Respectfully submitted,

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BRIEF FOR AMICUS CURIAE

Pursuant to Rule 29, Fed. R. App. P., the amicus curiae has moved for leave to file this brief in support of that portion of the order below which granted plaintiffs' motion for an award of costs and attorneys' fees.[1/]

INTEREST OF THE AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law is a non-profit corporation which was organized in 1963 at the request of President Kennedy to involve private lawyers throughout the nation in the struggle to assure equal civil rights for all Americans. The Committee's membership includes two former Attorneys General,

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1/ By filing a brief on the question of attorneys' fees, an issue of paramount concern to the amicus curiae, amicus does not wish to be understood as expressing any view on the other issues in the appeal.

twelve past Presidents of the American Bar Association, and a number of law school deans, as well as many of the nation's leading attorneys. Through its national office and its offices in Jackson, Mississippi, and twelve other cities, the Lawyers' Committee has actively engaged the services of over a thousand members of the private bar in addressing legal problems in such areas as voting, education, employment, welfare, housing, and the administration of justice. The amicus has long been concerned about awards of attorneys' fees as an essential element of appropriate relief in actions affecting the rights of poor people and members of minority groups, and has also been concerned about the amenability of state officials to effective remedial court orders. The Lawyers' Committee is itself involved in a case in which a Fifth Circuit panel has affirmed an award of attorneys' fees against state officials, but in which a rehearing *en banc* has now been ordered. *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973), *rehearing en banc granted.*

INTRODUCTION

This case was filed under 42 U.S.C. § 1983, a Reconstruction statute authorizing federal suits against state officials charged with violating rights secured by federal law or the federal Constitution. The suit challenged the failure of the Connecticut Welfare Commissioner, and others, to process welfare applications within the time required by federal law. In 1972, the district court found that defendants were in violation of federal law and of the four-

teenth amendment, and ordered the defendants to take steps to end the violations. In 1974, the district court found that there had been "widespread and substantial" noncompliance, which it termed "unjustified," with its prior orders. Accordingly, it reiterated and clarified those orders and, so far as relevant to this brief, awarded costs and attorneys' fees to the plaintiffs, to be paid by the defendant Welfare Commissioner in both his official and his individual capacity.

The Commissioner, represented by the Attorney General of Connecticut, does not deny that the attorneys' fee award is appropriate under traditional equitable principles, but challenges the jurisdiction of the federal courts to award attorneys' fees *or* to tax costs against a state official for any reason, on grounds that an award of either fees or costs would constitute a money judgment against the state treasury and is therefore barred by the eleventh amendment to the Constitution of the United States. This challenge is based principally on the recent case of *Edelman* v. *Jordan*, 39 L. Ed. 2d 662 (1974), and it is to the differences between *Edelman* and this case that the amicus brief is principally devoted.

There should be no mistaking the significance of this case, since the issue of the liability of state officials for attorneys' fees is arising with growing frequency, especially as state governmental bodies increasingly assume functions previously confided to local governments -- *e.g.*, cities and counties -- which are not im-

mune from suit.[2/]

Before the Supreme Court's decision in *Edelman*, several courts had held, and the Supreme Court in one case had affirmed, that attorneys' fees can be awarded against state officials sued in their official capacity. *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972)(three-judge court), *aff'd*, 409 U.S. 942 (1972); *Gates* v. *Collier*, 489 F.2d 298 (5th Cir. 1973), *rehearing en banc granted*; *Brandenburger* v. *Thompson*, 494 F.2d 885 (9th Cir. 1974); *La Raza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Calif. 1973), *appeal pending*.[3/]

Since *Edelman*, however, three circuit courts have focused on the fact that attorneys' fee awards against state officials involve payments from state treasuries and have proceeded to find such awards indistinguishable from the retroactive welfare payments condemned in *Edelman*. *Skehan* v. *Board of Trustees*, ____ F.2d ____ (3d Cir. 1974); *Jordon* v. *Gilligan*, ____ F.2d ____ (6th Cir. 1974); *Named Ind. Members* v. *Texas Highway Dept.*, 496 F.2d 1017 (5th Cir. 1974).

This case is significant because it squarely presents the question of state officials' immunity from attorneys' fees (and costs)

2/ Edelman v. Jordan, *supra*, at n.12.

3/ *But see* Sincock v. Obara, 320 F. Supp. 1098 (D. Del. 1970).

to this Court for the first time. In dictum, however, in *Jordan* v. *Fusari*, 496 F.2d 646 (2d Cir. 1974), this Court has already doubted the applicability of the eleventh amendment to attorneys' fees:

> "Moreover, it appears to us that the allowance awarded here, as part of an order granting injunctive relief, has at most the 'ancillary effect on the state treasury,' which *Edelman* v. *Jordan*, *supra*, characterizes as 'a permissible and often inevitable consequence of the principle announced in *Ex parte Young*' 209 U.S. 123 (1908). [Footnote citing *Brandenburger*, *supra*, *Sims*, *supra*, and other cases.]"

ARGUMENT

I. An Award of Costs or Attorneys' Fees Against a State or its Officials Has Only An Ancillary Effect on the State Treasury and is Therefore Not Barred by the Eleventh Amendment as Construed in *Edelman* v. *Jordan*.

Apart from the claim of immunity, appellant does not argue with the award as an appropriate exercise of the district court's discretion to fashion an equitable remedy. In light of the recent cases, such an argument would be essentially foreclosed. *Hall* v. *Cole*, 412 U.S. 1 (1973), *aff'g Cole* v. *Hall*, 462 F.2d 777 (2d Cir. 1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968); *Stolberg* v. *Members of the Board of Trustees*, 474 F.2d 485 (2d Cir. 1973); *Stanford Daily* v. *Zurcher*, 366 F. Supp. 18 (N.D. Calif. 1973); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *Knight* v. *Auciello*, 453 F.2d 852 (1st Cir. 1972); *Donahue* v. *Staunton*, 471

F.2d 925 (7th Cir. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972)(three-judge court), *aff'd*, 409 U.S. 942 (1972):

> "If, pursuant to this action, plaintiffs have benefited their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendants' good or bad faith. Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits, and to carry out congressional policy." 340 F. Supp. at 694.

Appellant, however, refers to the eleventh amendment, as construed in *Edelman* v. *Jordan*, *supra*, and contends that an award of costs or attorneys' fees would be the equivalent of a money award from the state treasury and is therefore beyond the jurisdiction of the federal courts. *Edelman* was a welfare case resulting in a Seventh Circuit order which, in addition to its prospective aspects, also ordered the defendants to pay benefits retroactively to those who had been unjustly denied them. The Supreme Court, agreeing with the view taken by this Court in *Rothstein* v. *Wyman*, 467 F.2d 226 (2d Cir. 1972), held that the retroactive payment was essentially a money award payable from the state treasury, and was therefore barred by the eleventh amendment, notwithstanding that the payment was denominated an equitable remedy (equitable restitution).

The Supreme Court in *Edelman* recognized the rule of *Ex parte Young*, 209 U.S. 123 (1908), authorizing federal courts to entertain suits against state officials at least for equitable or prospective relief, but emphasized that this doctrine must be read to conform

with the basic principles governing the eleventh amendment:

> "We do not read *Ex parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature." 39 L. Ed. 2d at 674-75.

The *Edelman* opinion went on to acknowledge that the difference between relief barred by the eleventh amendment and that permitted under *Ex parte Young* is often subtle. While characterizing the eleventh amendment as a protection of the state treasury from money awards, the *Edelman* court recognized that many forms of equitable relief have great fiscal impact on state treasuries, and went on to say that "such an ancillary effect is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*." 39 L. Ed. 2d at 675.

The courts which have denied attorneys' fees against state officials in reliance on *Edelman* have focused only on the fact that money is to be paid from the state treasury, and have ignored the distinction recognized by this Court in *Jordan* v. *Fusari*, *supra* -- the distinction between direct and ancillary effects on state treasuries. The *Edelman* opinion essentially draws the distinction between "a monetary loss resulting from a past breach of legal duty on the part of the defendant state officials" (direct effect), and payments which are a necessary consequence of the decree itself (ancillary effect).

In the view of the amicus curiae, this distinction is applicable and decisive in this case, for the distinction requires that the normal incidents of a suit properly within the jurisdiction of a federal court -- *e.g.*, costs, witness fees, attorneys' fees -- are to be regarded as ancillary and not barred by the eleventh amendment. The essential nature of such incidents is that they derive not from the past conduct of the state or its officials, but from the state's lawyers' maintenance of, and defense of, the suit. The costs or attorneys' fees to be paid by the state are based on the state's decision to litigate the claim and are a function of the time, work, and expense to which the state has put opposing counsel by its decision to resist his legal claims.[4/]

This is not to say that a state should be penalized for asserting its claims and defenses; if it chooses to do so, however, it

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4/ If appellant is held liable for costs and fees in his official capacity, there is no need to determine whether the district court was correct in holding him liable for them in his individual capacity. As to this issue, however, amicus notes that the Supreme Court in Scheuer v. Rhodes reaffirmed the Ex part Young holding that an official enforcing an invalid state statute "is subjected in his person to the consequences of his individual conduct. The state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 40 L. Ed. 2d 90, 97 (1974). And while Ex part Young dealt with suits for injunctions, numerous cases have involved suits for damages for simply enforcing a state statute. *E.g.*, Nixon v. Herndon, 273 U.S. 536 (1927); Myers v. Anderson, 238 U.S. 368 (1915). Quaere whether the state, *by assuming the defense of a suit* against its official, thereby substitutes itself as principal obligor for the costs and fees which are the incidents of the suit, in effect indemnifying (not immunizing) the official.

subjects itself to the normal incidents of suit in the same way as another litigant. The obligation of state officials to defend against suits in courts of the national government arises by virtue of laws passed pursuant to the Constitution of the United States. In such cases, to paraphrase the Supreme Court in *Fairmont Creamery Co.* v. *Minnesota*, 274 U.S. 70 (1927), "though a sovereign in many respects, the state when a party to litigation" in the federal courts "loses some of its character as such."

II. Awards of Costs and Attorneys' Fees Are Essential Incidents of Suits Permitted Under Ex Parte Young

While the award of fees and costs are ancillary forms of relief, as incidents of the suit rather than as elements of the state official's conduct which prompted the suit, they are nonetheless essential to the maintenance of the suit and the effective formulation of any type of relief.

The formulation of effective remedies has always been of central concern to Congress and the federal courts in their enforcement of federal rights, especially those which are termed civil rights and which are protected under 42 U.S.C. § 1983. *Louisiana* v. *United States*, 380 U.S. 145 (1966); *Bell* v. *Hood*, 327 U.S. 678 (1946); *see Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515 (1937). The legislative history of the Reconstruction laws, especially § 1983, manifests an overriding concern for development of creative remedies.

See 42 U.S.C. § 1988; *Lee* v. *Southern Home Sites, Inc.*, 444 F.2d 143 (5th Cir. 1971). 5/

5/ Indeed, if there can be any inference at all about what *specific* remedies Congress envisioned when it passed 42 U.S.C. § 1983, it would be that awards of attorneys' fees were contemplated. Section 1983 was originally section 1 of the Act of April 20, 1871, 17 Stat. 13. The original version of that section, after creating a cause of action, provided as follows:

> ". . . such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and the other remedial laws of the United States which are in their nature applicable in such cases."

This was a clear direction to search as widely as possible for effective remedies, and especially to search among other remedies created by Congress in other civil rights laws. This command is reinforced by the reference to the Act of April 9, 1866 (14 Stat. 27), because the 1866 statute was largely concerned with seeking effective remedies. In following Congress' directions to seek remedies from among its own civil rights laws, one need look no further than a law passed 11 months earlier, the Act of May 31, 1870. 16 Stat. 140. This statute, designed to protect the right to vote, created civil causes of action in §§ 2, 3 and 4, and provided that offenders should

> "forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just; and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than

[Footnote Continued]

This concern was reflected in *Ex parte Young*, 290 U.S. 123 (1908), a landmark case which enunciated a doctrine that has been called "indispensable to the establishment of constitutional government and the rule of law." C. Wright, *Handbook of the Law of Federal Courts* 186 (2d ed. 1970). The suability of state officers, established by *Ex parte Young*, is no minor exception to the eleventh amendment; rather, it is a fundamental mechanism for enforcing rights created by the Constitution and implemented by Congress to protect citizens against acts done in the name of their state governments. 6/ As the Supreme Court said in *General Oil Co.* v. *Crain*,

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[Footnote Continued]

one month and not more than one year, or both, at the decision of the court."

The relationship of the Act of May 31, 1870, to the other civil rights statutes is further strengthened by the fact that § 16 of the Act of May 31, 1870, re-enacted a portion of § 1 of the Act of April 9, 1866 (now codified as 42 U.S.C. § 1981), and § 18 of the Act of May 31, 1870, explicitly re-enacted the entire Act of April 9, 1866.

Thus when Congress passed its statute on April 20, 1871, directing the courts to apply "other remedies provided in like cases" and "the other remedial laws of the United States which are in their nature applicable in such cases," it must have contemplated that one such remedy might be provision for counsel fees, which it had explicitly authorized in a civil rights law passed only 11 months before.

6/ Amicus curiae does not believe it is necessary to this case to decide that the eleventh amendment was repealed, *pro tanto*, by the fourteenth, but we would note that, by ratifying the fourteenth amendment, the states bound themselves not to deny due process or equal protection. In section 5 of the fourteenth amendment, moreover,

[Footnote Continued]

209 U.S. 211 (1908), decided the same day as *Ex parte Young*:

> "Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation." 209 U.S. at 226. 7/

Against this background, the critical role of awards of costs and attorneys' fees in effectuating the principle of *Ex parte Young* becomes clear, for as this Court and the Supreme Court have recognized,

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[Footnote Continued]

the states authorized Congress to enforce those guarantees, which it did when it created the cause of action for official injury now codified as 42 U.S.C. § 1983.

7/ Nor did the Court regard this as a fanciful possibility, for it was fully aware that government officials may misuse their power even where they do not deliberately set out to interfere with Constitutional rights:

> "Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. *See* Ex parte Young, where this subject is fully discussed and the cases reviewed."
>
> 209 U.S. at 227.

the right to sue is illusory without the means of suit:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it." *Cole* v. *Hall*, 462 F.2d 777, 780-81 (2d Cir. 1972), *quoted at* 412 U.S. 1, 13 (1973).

If anything, the concept described in *Cole* v. *Hall* applies with even more force when one of the parties is a lone citizen or group of citizens and the other is a State.

In many cases, then, the availability of costs and attorneys' fees is the linchpin of all other remedies, and therefore of the very right to sue. A right so important as the right to sue state officials, and thereby to stop enforcement of invalid state laws, cannot be throttled by barring a court which has proper jurisdiction over the case and parties before it, from ordering a remedy which, though ancillary to the principal relief, is essential if the suit is to be brought, and consequently essential if the federal right is to be protected.

III. Attorneys' Fees Are Analogous to Costs, Which Are Unquestionably Available Against States And State Officials

The state argues that awards of costs are governed by the same

principles as awards of attorneys' fees, insofar as state immunity is concerned. Amicus curiae agrees, but draws a different conclusion from the similarity. Contrary to appellants' claims, the amenability of states and state officials to taxation of costs is settled, in the Supreme Court, *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927); in the lower federal courts, *State of Utah* v. *United States*, 304 F.2d 23 (10th Cir. 1962), and by unvarying practice in hundreds or thousands of cases, beginning at least as far back, according to the Supreme Court, as the mid-19th century. As described above, costs, like attorneys' fees, are incidents of the suit itself rather than of the underlying conduct of the state official which gave rise to the suit, and therefore the settled rule that a state or state officials may be taxed with costs requires that they be likewise amenable to attorneys' fee awards.

IV. Recent Federal Legislation Authorizing Attorneys' Fees Against States and State Officials Shows That The Eleventh Amendment Is No Bar to Such Awards

If the eleventh amendment is read to bar courts from awarding attorneys' fees against states or state officials, the bar presumably extends to Congress as well, notwithstanding the tortured description of "consent" set forth in such recent cases as *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1964), and *Employees* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973).

Yet Congress has twice in the past two years recognized that

an award of attorneys' fees against a state or its officials is a natural and necessary feature of litigation that has successfully secured federal rights.

Section 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617, provides in pertinent part that:

> "upon the entry of a final order by a Court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color or national origin in violation of Title VII of the Civil Rights Act of 1964 or the Fourteenth Amendment to the Constitution of the United States, as they pertain to elementary and secondary education, the Court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Similarly, Title VII of the Civil Rights Act of 1964 provides in § 706 for reasonable attorneys' fees to the prevailing party. 42 U.S.C. § 2000e-5(k). Title VII was amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e, so as to render "governments, governmental agencies, [and] political subdivisions" proper party defendants in actions seeking to vindicate employment rights. Thus, attorneys' fees may now be recovered against state governments in employment discrimination cases.

Congress' action in the Emergency School Aid Act of 1972 and the Equal Employment Opportunity Act of 1972 is the most effective response to appellant's argument that sovereign immunity principles

resting on the eleventh amendment bar the relief fashioned in the instant case. Acceptance by this court of appellants' position would lead to the conclusion that remedial federal legislation, enacted pursuant to the fourteenth amendment, is unconstitutional in the absence of consent. The correct view is that the eleventh amendment does not bar the enforcement of a fee award against state funds where there has been a violation by state officers of a congressional statute such as section 1983 that protects federal rights.

CONCLUSION

In the aftermath of *Edelman* v. *Jordan*, several circuits have, rather uncritically, concluded that attorneys' fees, being awards of money to be paid, presumably, from state treasuries, are barred under the principles of that case. The amicus curiae believes that a careful analysis of *Edelman* and of its constitutional background requires a contrary conclusion, and urges this Court to hold that attorneys' fees, where appropriate, may be awarded against state officials who have violated federal rights that this Court was created to protect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have served the foregoing Brief for Amicus Curiae and Motion for Leave to File Brief Amicus Curiae on counsel for appellants and appellees by mailing three copies, first class postage prepaid, to each of the following:

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August 29, 1974

Martha G. Bannerman

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August 16, 1974

Armand Derfner, Esquire
Lawyers' Committee for Civil Rights
Attorneys' Fees Project
4 Gillon Street
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Re: Class v. Norton, No. 74-1702
(2d Cir., filed May 20, 1974)

Dear Mr. Derfner:

This will acknowledge receipt of your letter, dated August 13, 1974, requesting our consent to the filing of an amicus curiae brief in the above-entitled case. I have consulted with my co-counsel on this matter and we both consent to the filing of an amicus curiae brief on behalf of appellees and you may so inform the Court.

Your interest is appreciated.

Very truly yours,

James C. Sturdevant

cc: Marilyn K. Katz, Esquire
Edmund C. Walsh, Esquire
A. Daniel Fusaro, Clerk
United States Court of Appeals for the Second Circuit

JCS:erv

STATE OF CONNECTICUT

ROBERT K. KILLIAN
ATTORNEY GENERAL

ATTORNEY GENERAL'S OFFICE
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19 August 1974

Armand Derfner, Esquire
Lawyers' Committee for
Civil Rights Under Law
4 Gillon Street
Charleston, South Carolina 29401

Re: Class v. Norton, 74-1702 (2nd Cir.)

Dear Mr. Derfner:

In reply to your letter dated August 13, 1974, I must, regrettably, deny your request to be permitted to file an amicus brief in this appeal.

Because of the very limited time remaining from the date on which the appellees' brief is due (August 28th) until the date of the hearing (September 9th), it would be impossible for me to file a reply brief. This would not be fair to the appellant, my client, in this action.

Very truly yours,

Robert K. Killian
Attorney General

By Edmund C. Walsh
Edmund C. Walsh
Assistant Attorney General

ECW:gcr